



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 11, 1998

Ms. Tina Morales  
Senior Records Analyst  
Office of the District Attorney  
P.O. Box 1748  
Austin, Texas 78767

OR98-1441

Dear Ms. Morales:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114729.

Travis County (the "county") received a request for "the Ruben Shumake file." You state that you have provided some records, but have not released information that constitutes a compilation of criminal history. You submitted the records at issue to this office for review, asserting various exceptions to disclosure, including sections 552.101 and 552.108 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the Government Code by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *See also* Gov't Code 411.084 (prohibiting release of criminal history information obtained from Department of Public Safety). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public.

The privacy interest in criminal history record information has been recognized by federal regulations which limit access to criminal history record information which states obtain from the federal government or other states. *See* 28 C.F.R. § 20; *see also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (finding criminal history information protected from disclosure under Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a). Recognition of this privacy interest has been echoed in open records decisions

issued by this office. See Open Records Decision Nos. 616 (1993), 565 (1990), 216 (1978), 183 (1978), 144 (1976), 127 (1976).<sup>1</sup>

In *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (hereinafter "*Houston Chronicle*"), the court addressed the availability under the Open Records Act of certain broad categories of documents in the possession of a city police department, including offense reports, police blotters, "show-up" sheets, arrest sheets, and "Personal History and Arrest Records." The court held that some of this information was available to the public under the Open Records Act, including the police blotters, "show-up" sheets, and offense reports.<sup>2</sup> However, the court also held that "Personal History and Arrest Records" were excepted from required public disclosure. These records primarily contained criminal histories, such as information regarding previous arrests and other data relating to suspected crimes, including the offenses, times of arrest, booking numbers, locations, and arresting officers. *Houston Chronicle*, 531 S.W.2d at 179. Such a criminal history record is generally referred to as a "rap sheet." The court held that release of these documents would constitute an unwarranted invasion of an arrestee's privacy interests. *Id.* at 188.

Based upon the request and the county's response to the request, we conclude that the information concerning Mr. Shumake in this situation is of the same type made confidential by *Houston Chronicle*. As the requestor seeks the county's complete criminal file on Mr. Shumake, release of this information also provides Mr. Shumake's criminal history information. As noted above, federal and state case law regarding an individual's right to privacy expressly prohibits the release of such information. Accordingly, we conclude that the county must withhold from disclosure Mr. Shumake's records in the submitted Exhibits.

You also submitted to this office information that concerns individuals other than Mr. Shumake. You assert that many of the records in Exhibits A, B, and C are compilations, put together by the county, of the criminal histories on these other individuals. We agree that the compiled criminal histories of these other individuals also must be withheld from disclosure to protect their privacy interests, as discussed previously.

We will address the remaining submitted information to the extent these records are not part of the criminal history compilations on Mr. Shumake and the other individuals. You

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<sup>1</sup>The Code of Federal Regulations defines "criminal history information" as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release." 28 C.F.R. § 20.3(b). The information at issue here fits this description.

<sup>2</sup>Specific information held to be available in *Houston Chronicle Publishing Co.* includes, among other things, social security number, names, aliases, race, sex, age, occupations, addresses, police department identification numbers, and physical conditions. See Open Records Decision No. 127 (1976) at 3; see also Open Records Decision Nos. 508 (1988), 394 (1983), 366 (1983).

assert that some of the remaining information is protected from disclosure under section 552.101, in conjunction with other statutes. Section 552.101 provides an exception from disclosure for information that is confidential by law. You assert that section 552.101, in conjunction with section 58.007 of the Family Code, excepts from disclosure the records in Exhibit C that are not otherwise protected as criminal history compilations as discussed previously. The remaining records in Exhibit C are confidential pursuant to former section 51.14(d) of the Family Code, which provides in part that "law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public." Open Records Decision No. 644 (1996).<sup>3</sup>

You assert that the highlighted portions of records in Exhibit D reveal the identity of a confidential informant. The informer's privilege protects certain information from disclosure under section 552.101. Open Records Decision No. 549 (1990) at 4. For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. See Open Records Decision Nos. 515 (1988) at 2-5, 391 (1983). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990). However, the exception is inapplicable if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 (1978) at 2. The information at issue does not appear to identify the confidential informant. Rather, you appear to have highlighted information that discloses the fact that there is a confidential informant. Thus, the highlighted information in Exhibit D may not be withheld from disclosure under the informer's privilege.

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<sup>3</sup>Section 58.007(c) of the Family Code applies to juvenile law enforcement records concerning conduct occurring on or after September 1, 1997, that are maintained by law enforcement agencies. Section 58.007 of the Family Code does not make confidential juvenile law enforcement records concerning juvenile conduct occurring between January 1, 1996 to August 31, 1997. Open Records Decision No. 644 (1996). Juvenile law enforcement records concerning conduct occurring prior to January 1, 1996 are governed by the law in effect at the time of the conduct. Open Records Decision No. 644 (1996).

You also assert that the documents in Exhibit D are protected from disclosure under section 552.108(a)(3) of the Government Code.<sup>4</sup> Section 552.108(a)(3) protects from disclosure records held by a law enforcement agency or prosecutor if the information (1) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation, or (2) reflects the mental impressions or legal reasoning of an attorney representing the state. We note that section 552.108 is a statutory exception and for information to be excepted from disclosure under section 552.108(a)(3), a governmental body must show the applicability of the statutory exception to the records at issue. The records in Exhibit D are investigative narratives that concern a police investigation of possible criminal activity and do not appear to have been prepared by a prosecuting attorney in anticipation of or in the course of preparing for criminal litigation. You state, however, that the Exhibit D records were obtained by the district attorney's office in preparation for this particular prosecution and that these documents reflect the prosecuting attorneys' mental impressions as to which issues were important in the case. Based upon your assertion that these records reflect the prosecuting attorneys' mental impressions and legal reasoning, Exhibit D may be withheld from disclosure.

You also assert that section 552.108(a)(3) protects from disclosure the documents in Exhibits E and F. We note that section 552.108 does not except from disclosure information that is otherwise public, such as information filed with a court. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Exhibit F also includes photographs and other documents that appear to have been filed with a court and may not therefore be withheld from disclosure. Exhibit F telephone messages, which do not appear to have been prepared by the prosecution for the criminal litigation. You also have not shown how the telephone messages reflect the prosecuting attorneys' mental impressions or legal reasoning. To the extent that the prosecutor highlighted or made notations on these records, we agree that these messages may be withheld from disclosure under section 552.108(a)(3). The records also include a photocopied driver's license, to which you have not shown the applicability of section 552.108(a)(3). We note that the photocopied driver's license must be withheld from disclosure under section 552.130, however.

You indicate, and it appears from our review, that many of the records at issue in Exhibits E and F were created by the prosecution in anticipation of criminal litigation. These records may be withheld from disclosure under section 552.108(a)(3). You also assert that the remaining records were compiled by the prosecution and reflect the prosecuting


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<sup>4</sup>We note that you assert because the requestor sought the entire file, the records are protected in their entirety under *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). In Open Records Decision No. 647 (1996) at 5, this office determined that if a requestor asks for an attorney's entire file regarding particular litigation, such a request may be denied in its entirety under section 552.111 based on the Texas Supreme Court's holding in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). In *National Union*, the court held that a request for an attorney's entire litigation file is "objectionable under the attorney work product exemption from discovery." *Id.*, 863 S.W.2d 458, 461. We note that you have already released some of the records from the file to the requestor, thus it appears that you have waived the argument that the entire file is protected from disclosure. We also note that you argue *Curry* for a section 552.108 exception. However, section 552.108 is a statutory exception that sets out various standards that must be met to show the exception is applicable.

attorneys' mental impressions and legal reasoning. Thus, the records in Exhibits E and F, except as discussed above, may be withheld from disclosure under section 552.108(a)(3).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 114729

Enclosures: Submitted documents

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